IN THE

Supreme Court of the United States

October Term, 1976.

No. 76-1356.

MERCEDES-BENZ OF NORTH AMERICA, INC. and DAIMLER-BENZ A. G.,

Petitioners,

v.

JULES LINK and SOLOMON KATZ, on Behalf of Themselves and All Others Similarly Situated,

Respondents.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF STATUTORY CERTIORARI, AND, IN THE ALTERNATIVE, FOR A WRIT OF COMMON LAW CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND MOTION FOR LEAVE TO FILE PETITION.

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Respondents' Brief is a veritable catalogue of errors and misstatements, both of the facts of this case,[1] and of of the law applicable thereto.[2] It is an argument on the merits and treats in only a cursory fashion whether or not certiorari should be granted.

1. A principal contention of Respondents, that this Court is precluded from reviewing the refusal of a court of appeals to entertain a § 1292(b) appeal on the basis of

1. Respondents misstate their own complaint by stating that only "certain" dealers are alleged to have conspired (Respondents' Brief at 2). The complaint, however, alleges that all dealers conspired (R. 7a). Also, their assertion that there are 26,000 items and fewer parts (Respondents' Brief at 3) is erroneous; there are 49,000 items and 26,000 *different* parts (R. 207a *et seq.*).

Respondents also conveniently overlook the fact that Mercedes, in accordance with its warranty obligations, is the largest single purchaser of services from dealers under the warranty repair labor time guides which Respondents imply is an instrument to fix the price of non-warranty repairs above competitive levels. Thus, under Respondents' theory, Mercedes is the chief victim of its own conspiracy.

Respondents further mistake the issues involved. Respondents' assertion that "markups are pronouncedly consistent" (Respondents' Brief at 3), while superficially appealing in its simplicity, is in fact irrelevant. Respondents cannot establish liability under § 4 of the Clayton Act by showing that "markups are pronouncedly consistent" even if they prove a conspiracy to fix prices. They must prove that the price for each part exceeded the price each member of the class would have paid absent a conspiracy. Furthermore, the amount of any excess of the price actually charged, if any, will vary for different parts, in different markets, at different times, for different dealers, regardless of what the "markups" may be.

2. For example, Respondents rely heavily on selected lower court decisions on the issues which Petitioners have asked this Court to review, and fail to acknowledge the plethora of lower court decisions contrary to their view. The very existence of these conflicting lower court decisions on issues which this Court has never addressed should impel the Court to grant certiorari.

Liberty Mutual Insurance Co. v. Wetzel, 424 U. S. 737 (1976) (Respondents' Brief at 1, 8), is a gross misstatement of the holding in that case. There is no support in *Liberty Mutual* or any other case for the incredible proposition that this Court is foreclosed from giving guidance to lower courts on the proper interpretation of an act of Congress merely because the act vests in them some measure of discretion. *See Pittsburgh Plate Glass Co. v. United States*, 360 U. S. 395 (1959), wherein this Court reviewed the decision of a lower court for an abuse of discretion where the issue involving the Federal Rules of Criminal Procedure was entrusted "to the discretion of the trial judge." 360 U. S. at 399.

Petitioners seek this Court's review, not of the exercise of discretion by the court of appeals in considering § 1292(b) appeals, but of that court's misdefinition or overly restrictive interpretation of the legal framework (i.e., controlling question of law) within which it may exercise such discretion (Petition at 12-17). *See Fallen v. United States*, 378 U. S. 139 (1964). In providing guidance this Court can and should reject formulations of lower courts which it finds to be in error, even in cases where broad discretion, exercised in the absence of erroneous formulation, would have been permitted. *See Coleman v. Paccar, Inc.*, 424 U. S. 1301 (1976) (Rehnquist as Circuit Justice).

2. Respondents argue that class certifications are never reviewable since they are conditional and discretionary, and that any contrary view would "make a mockery of the 'final judgment' rule" (Respondents' Brief at 9). Their view would emasculate § 1292(b), which is a congressionally mandated exception to the final judgment rule, and which was adopted at the urging of the judiciary (Petition at 13-14). The very issue raised by this Petition is the proper interpretation of that act.

3. Respondents appear to excuse the failure of the district court to make the findings specifically required by Rule 23[3] (Petition at 10) by the bootstrap argument that a class action determination in itself is the only required finding (Respondents' Brief at 10). However, Respondents avoid two of the crucial issues which Petitioners ask this Court to review and decide: first, that class action representatives must demonstrate compliance with Rule 23 *before* certification (Petition at 25 *et seq.*); and, second, that district courts must make detailed findings *before* certification (Petition at 21 *et seq.*). Further, Respondents take the untenable position that Rule 23 findings are factual only. This Court previously rejected such simplistic formulations of complex factual-legal questions when it held:

> "That great weight is to be given to the findings of fact by the two lower courts is a rule of wisdom in the exercise of the reviewing power of this Court. But in the enforcement of the rule it is important to discriminate between more or less subordinate facts leading to a judgment of their legal significance, and a conclusion—though concurred in by two courts—that may in fact imply a standard of law on which judgment on the case in its entirety is based. *Baumgarter v. United States*, 322 U. S. 665, 670, 671, 88 L. ed. 1525, 1529, 1530, 64 S. Ct. 1240; *United States v. Appalachian Electric Power Co.*, 311 U. S. 377, 403, 404, 85 L. ed. 243, 250, 251, 61 S. Ct. 291." *Offutt v. United States*, 348 U. S. 11, 15 (1955).

3. All references to Rule 23 are to the Federal Rules of Civil Procedure. See the dissenting opinions of Judges Van Dusen and Gibbons (Op. A41 *et seq.*; Op. A44 *et seq.*).

A basic function of appellate courts is to review the application of law to facts. The factual determinations of Rule 23 are, at a minimum, ultimate questions of fact, the resolutions of which become standards of law by which other class action motions are evaluated.

Early review of large class determinations by appellate courts is particularly appropriate (Petition at 14-17) and this Court should now determine the standards which district courts must apply in determining the typicality, commonality, and manageability requirements of the Rule.[4] It is "[t]he importance of the administration of the Federal Rules of Civil Procedure, together with the uncertainty existing on the issue among the Court of Appeals," *La Buy v. Howes Leather Co.*, 352 U. S. 249, 251 (1957), which necessitates that this Court grant certiorari.

4. Respondents argue that since a class determination "may" be "conditional," any class action determination is inappropriate for § 1292(b) review (Respondents' Brief at 6, 9). Petitioners do not dispute that a court may "conditionally" certify a class which it has determined meets the requirements of Rule 23. However, the court, as it did in this case, may not "contingently" certify a class with the speculative expectation that plaintiffs may later meet their burden under Rule 23 (Petition at 20-21). This court should now definitely require that class action representatives meet their burden before certification.

5. Respondents' argument that "the district court did not order a bifurcated trial of liability and damages before separate juries" (Respondents' Brief at 14) is beside the

4. Respondents erroneously state that the first question certified by the District Court under § 1292(b) was "numerosity". Actually numerosity (whether the class is too numerous to permit joinder) has never been at issue. The court of appeals erroneously characterized the first question as manageability (Op. A28), which it considered "primarily a factual one . . ." (Op. A32). However, the question certified was whether the district court's class action determination was proper given the factual matrix of this case (A2).

point because in any event, as noted by all four dissenters in the court of appeals, the "assumed propriety" of such procedure was one of the "prime predicates" of the district court's class determination (Op. A40); (Petition at 25-26). Respondents' reliance on *Government & C. E. O. C., CIO v. Windsor*, 353 U. S. 364 (1957) and dictum in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123 (1950), for the proposition that the issue is conjectural is entirely misplaced in that *Windsor* related to a federal court's refraining from constitutional decisions pending determination of local law questions by a state court, and *McGrath* concerned review of action by a coordinate branch of government.

The Seventh Amendment issue is before this Court, as it was in *Dairy Queen v. Wood*, 369 U. S. 469 (1962) and *Ross v. Bernhard*, 396 U. S. 531 (1970), and should be now reviewed.

6. Respondents have completely inverted the standard set forth by this Court in *Gasoline Products v. Champlin Refining Co.*, 283 U. S. 494 (1931), in declaring that it permitted partial retrial "unless the issue to be retried is inseparably interwoven with the remaining issues" (Respondents' Brief at 16). To the contrary, *Gasoline Products* held that partial retrial was impermissible "unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice." 282 U. S. at 500. Petitioners ask the Court to decide whether, in this case or any § 4 *Clayton Act* case in which liability and damages are completely intertwined (Petition at 27-28), a bifurcated trial of those issues before separate juries is permissible.[5]

5. Unless the issues of liability and damages are tried before the same jury, the proof of "fact of injury" or "damage" to establish liability, and the proof to establish the "amount of such injury" or "damages" would so overlap that the second trial would be but a retrial of the first with the risk of inconsistent verdicts.

CONCLUSION.

Petitioners contend that the district court erred in certifying a 300,000 member nationwide class where the proof of injury will vary for each member of the class and where the basis for such certification was the assumed propriety of the use of separate juries for the determination of liability and damages. The lower court's decision in this case presents to this Court for its determination, the authoritative interpretation of the requirements of Rule 23. The Court's definitive guidance is needed to end the chaos produced by the myriad of conflicting lower court decisions, which can only be rationalized on the basis of the individual court's opinion as to the social desirability of class actions.

This case also presents an opportunity for the Court, to interpret the Interlocutory Appeals Act of 1958, 28 U. S. C. 1292(b) and remedy the uncertainty pertaining thereto, an uncertainty demonstrated by the internal conflict within the court of appeals in this case.

For the reasons set forth in the Petition and in this Brief, the Petition for Certiorari should be granted.

Respectfully submitted,

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